85-1204

Supreme Court, U.S.
FILED
JAN 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

CHARLES TERRY,

Petitioner,

vs.

MARTIN STONE, HARVEY L. KARP, GEORGE H. LEVINE, and MONOGRAM INDUSTRIES, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

JOHN JOSEPH HALL

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Los Angeles, CA 90026
(213) 250-1145

Attorney for Petitioner

QUESTION PRESENTED

Whether Federal Due Process and the Full Faith and Credit Clause were violated by a California Court of Appeal holding that an unlitigated settlement of a Delaware class action against certain defendants for breach of fiduciary duty constituted res judicata as to an individual action for breach of fiduciary duty against the same defendants, filed in California by petitioner, a California resident who had no contact with Delaware, did not appear in the Delaware action, and was inadequately represented there.

SUBJECT INDEX

	Page
Question Presented	i
Opinion Below	2
Jurisdiction	2
Constitutional Provisions Involved	3
Introduction	4
Statement of the Case	4
Statement of Facts Alleged in Petitioner Terry's Complaint	11
Reasons for Granting the Writ	14
1. The Delaware Consent Judgment by unlitigated settlement of Delaware class actions fails to constitute res judicata as to Terry's California action and is not entitled to full faith and credit.	14
2. Since Petitioner was not a party to the Delaware Consent Judgment, which was unlitigated, Petitioner is not bound by the Delaware Consent Judgment.	21
Conclusion	25

TABLE OF AUTHORITIES CITED

CASES	PAGES
Blue Chip Stamps v. Manor Drug Stores (1975)421 U.S.723,750	10, 22
Fox Publishing Co. v. U.S.(1961) 366 U.S. 683, 691	10, 18
Phillips Petroleum Co. v. Shutts (1985) 472 U.S.___, 86 L Ed 2d 628, 105 S.Ct. ___	16, 17, 18
United States v. International Bldg. Co. (1953) 345 U.S. 502,506	10

CONSTITUTIONAL PROVISIONS	
Fourteenth Amendment, Section 1	3
Article IV, Section 1	3

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, filed in the above entitled case on July 10, 1985.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, is unreported and appears in Appendix A hereto.

JURISDICTION

After the filing of the opinion of the Court of Appeal of the State of California, Second Appellate District, petitioner timely filed a petition for review of the opinion of the Court of Appeal in the Supreme Court of California. The petition for review was denied by the Supreme Court of California on October 16, 1985. The Chief Justice and one Associate Justice were of the opinion that review should be granted. However, four justices must agree to grant review, similar to this Court's granting certiorari.

A copy of the notice of denial appears in Appendix B hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> "... Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article IV, Section 1:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

Introduction

There are two state court appeals in this case, appeal No. B002941 from a stay order under forum non conveniens, and a second appeal under No. B008588 from an order dismissing petitioner's action. The Court of Appeal consolidated the two appeals. The Clerk's transcript references to the record in the first appeal, No. B002941 are followed by Roman numeral I and in the second appeal by Roman numeral II.

STATEMENT OF THE CASE

On February 17, 1983, petitioner Terry, a shareholder in Monogram stock, filed an action as plaintiff individually for breach of fiduciary duty and damages, including compensatory and punitive damages, against defendants, Martin Stone, Harvey

L. Karp, George H. Levine, as Monogram officers, and Monogram Industries, Inc., a Delaware corporation, in Los Angeles Superior Court, under Case No. WEC 78784, West District. (C.T. p. 1) (II)

At the time he filed this action, Terry was over 70 years old and a resident of Los Angeles County, California, for over 40 years (C.T. p. 292) (I)

Shortly after petitioner's action was filed, defendants filed a motion to stay petitioner's action on the ground of forum non conveniens and lack of jurisdiction, alleging that two similar actions by Monogram stockholders had been filed earlier against the same defendants as class actions in Delaware.

The Los Angeles Superior Court

refused to permit petitioner any discovery on the issues of jurisdiction or forum non conveniens and thereafter granted a stay of petitioner's action by its order of May 16, 1983 under forum non conveniens, over petitioner's objections, among others, of a violation of constitutional due process.

Petitioner filed a petition for writ of mandate in the Court of Appeal of the State of California, Second Appellate District, raising the issue, among others, of a violation of constitutional due process under the Constitution of the United States, Fourteenth Amendment, Section 1, because of the denial of discovery by the trial court.

The petition was denied by the Court of Appeal without opinion, on

June 22, 1983, except to state that there was "a plain, speedy, and adequate remedy in the ordinary course of law by way of appeal ..." A copy of the denial appears in Appendix C hereto. A timely petition for hearing after denial of the petition for the writ of mandate was also denied by the Supreme Court of California on August 10, 1983.

Petitioner then filed an appeal from the stay order of May 16, 1983 in the Court of Appeal of the State of California, Second Appellate District. In his brief for this appeal, petitioner set forth facts, among others, relating to the violation of constitutional due process referred to above. While this appeal, No. B002941, was pending,

respondents filed a motion to dismiss petitioner's California action on the alleged ground of res judicata, claiming that the Delaware actions had been settled as a class action and that petitioner was bound thereby, although petitioner had never appeared in the Delaware class actions, and had never consented to the jurisdiction of the Delaware court. Nor had the Delaware court sent petitioner an "opt out" form or "request for exclusion" form. (C.T. p. 265) (II) Petitioner opposed defendants' motion to dismiss on the grounds that petitioner was inadequately represented in the Delaware class action, there was no jurisdiction over him by the Delaware courts, and that there was no res judicata or collateral

estoppel effect of the Delaware consent judgment, thereby implicitly raising the issues of due process and of absence of full, faith and credit under the Constitution of the United States.

The Los Angeles Superior Court granted defendants' motion to dismiss in an order filed July 2, 1984, from which petitioner appealed to the Court of Appeal, Second Appellate District, in appeal 2nd Civil No. B008588 (C.T. p. 334) (II)

The Court of Appeal consolidated both appeals and in its opinion filed July 9, 1985, dismissed appeal No. B002941 as moot and affirmed the order of dismissal in appeal No. B008588.

In appeal No. B008588, petitioner raised the issues, among others, of

inadequate representation of petitioner in the Delaware class actions, and no res judicata or collateral estoppel effect of the Delaware consent judgment, under decisions of this Court in Fox Publishing Co. v. U.S. (1961) 366 U.S. 683, 691, Blue Chip Stamps v. Manor Drug Stores (1975) 421 U.S. 723, 750, and United States v. International Bldg. Co. (1953) 345 U.S. 502, 506, thereby indicating lack of constitutional due process and no requirement of full, faith and credit for the Delaware consent judgment.

A copy of the opinion of the Court of Appeal appears in Appendix A hereto.

Petitioner then filed a petition for review of the opinion of the Court of Appeal in the Supreme Court

of California, which was denied on October 16, 1985. A copy of the notice of denial appears in Appendix B hereto.

Statement of Facts Alleged in Petitioner Terry's Complaint

Petitioner's complaint contains a single cause of action and alleges that Terry was and is a resident of Los Angeles County, California, and the owner of 8,000 shares of Monogram stock at all times mentioned therein. (C.T. p. 1) (II)

Defendant Martin Stone was Chairman of the Board of Directors and Chief Executive Officer of defendant Monogram, and the owner of approximately 208,000 shares of the common stock outstanding of defendant Monogram. (C.T. p. 2) (II)

Defendant Harvey L. Karp was Vice-Chairman of the Board of Directors, President and Chief Operating Officer of defendant Monogram and the owner of 192,749 shares of the outstanding common stock of defendant Monogram (C.T. p. 2) (II)

Defendant George H. Levine was Vice-President and Director of defendant Monogram and the owner of 99,500 shares of the outstanding common stock of defendant Monogram. (C.T. p. 2) (II)

Defendants Stone, Karp, and Levine dominated the management of defendant Monogram and together had a controlling interest of the outstanding common stock of defendant Monogram and as directors of Monogram, were and are fiduciaries with respect

to plaintiff Terry. (C.T. p.2) (II)

Defendants Stone, Karp, and Levine made an agreement with Nortek, a Rhode Island corporation, to sell their stock to Nortek for approximately $35,400.00 cash, together with an additional $4.4 million cash to settle benefit plans provided by defendant Monogram to the individual defendants. The sale of the stock and consummation of the benefit plan agreement was consummated on January 31, 1983. (C.T. p. 2) (II)

At no time did defendants Stone, Karp, Levine, or Monogram inform plaintiff of the contemplated sale of the stock to Nortek or offer or permit plaintiff to participate in the sale of the stock. (C.T. p. 3) (II)

The price of the stock under the Nortek agreement was approximately

$75 per share and was publicly announced on December 21, 1982, at which time, the common stock of Monogram was approximately $50 on the New York Stock Exchange. (C.T. p. 3) (II)

Terry has been damaged because of the acts and conduct of the defendants by not being allowed to participate in this sale of the stock to Nortek and in amounts unknown at this time in view of the decline of the value of Monogram stock on the New York Stock Exchange since December 21, 1982, due to the sales agreement. (C.T. p. 3) (II)

Since defendants Stone, Karp, and Levine acted in conscious disregard of plaintiff's rights as a shareholder of defendant Monogram in entering into

their agreement with Nortek, they have acted with opporession, fraud, and malice in entering into that sales agreement. Defendant Monogram aided and abetted the individual defendants in entering into and in consummating the sales agreement and the settlement of the benefit plans, for which plaintiff is entitled to punitive damages. (C.T. p. 4) (II)

REASONS FOR GRANTING THE WRIT

1. THE DELAWARE CONSENT JUDGMENT BY UNLITIGATED SETTLEMENT OF DELAWARE CLASS ACTIONS FAILS TO CONSTITUTE RES JUDICATA AS TO TERRY'S CALIFORNIA ACTION AND IS NOT ENTITLED TO FULL FAITH AND CREDIT.

It is undisputed that Petitioner Terry never appeared in the Delaware actions, nor consented to the jurisdiction of the Delaware court. Terry was never provided with an opportunity

to remove himself from the class because the Delaware court never sent him an "opt out" or "request for exclusion" form, as required by due process under the recent U. S. Supreme Court decision in Phillips Petroleum Co. v. Shutts (1985) 472 U.S.____, 86 L Ed 2d 628, 105 S.Ct____, where this Court held in a multi-state class action:

> ". . . we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." (86 L Ed 2d 642)

Since the Delaware court failed to conform to the requirements of due

process under Phillips Petroleum Co., the Delaware court judgment is not entitled to full faith and credit and cannot be res judicata as to Terry's California action.

Further, Terry's California action, an action at law, included punitive damages. No punitive damages were asked for or included in the Delaware actions. Instead, the Delaware actions asked for an injunction and accounting of profits, thus seeking equitable relief. Terry's action is limited to an action at law, does not seek an injunction or an accounting of profits, and is an individual action, not a class action nor a derivative action as were the Delaware actions.

The U. S. Supreme Court has held that due process requires adequate

representation of class members in a class action.

In Phillips Petroleum Co. v. Shutts, cited above, this Court held:

> "Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class member, Hansberry 311 U.S. at 42-43, 45."

In Fox Publishing Co. v. U.S. (1961) 366 U.S. 683, 691, the United States Supreme Court held as follows:

> ". . . the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation. . ."

Since neither of the two Delaware

class actions requested punitive damages, and there was no settlement based upon a request for punitive damages in Delaware, there was no adequate representation of plaintiff Terry's interests in Delaware since he reasonably expected to raise the issue of punitive damages as is clearly shown by his California action.

Due to the absence of punitive damages alleged in the Delaware actions, and the different nature of the Delaware actions and the relief requested therein, Terry was inadequately represented in the Delaware class actions such that the Delaware court's judgment failed to constitute res judicata as to Terry's California action.

In view of the increasing number

of multi-state class action cases, of which this Court can take judicial notice, this Court should grant the within petition to resolve the important issues of jurisdiction and res judicata presented herein.

The opinion of the Court of Appeal states that Terry is precluded from asserting that the Delaware judgment is not binding upon him because he conformed to the Delaware settlement. (Opinion, p. A-6) The Court of Appeal has no supporting authority for this statement and conclusion other than its own opinion.

Petitioner is unaware of any authority holding that mere conformance by petitioner, a California resident, to an unlitigated class action settlement in another state,

has a res judicata effect when petitioner has never appeared or consented to jurisdiction of that state and has no contact with that state.

It would appear that the opinion of the Court of Appeal presents a case of first impression which on this ground alone merits review by this Court.

2. SINCE PETITIONER WAS NOT A PARTY TO THE DELAWARE CONSENT JUDGMENT, WHICH WAS UNLITIGATED, PETITIONER IS NOT BOUND BY THE DELAWARE CONSENT JUDGMENT.

Plaintiff Terry's Califcrnia action is not a class action but a breach of fiduciary action against the defendants.

The Delaware class actions also involve derivative actions on behalf of Monogram. Plaintiff Terry's

California action is not a derivative action in any way.

The Delaware class actions were settled by a consent judgment without litigating any questions of fact.

Petitioner was never a party to the Delaware Consent Judgment.

The United States Supreme Court has recognized that such a consent judgment is not enforceable against a party such as plaintiff Terry in the case of Blue Chip Stamps v. Manor Drug Stores (1975) 421 US 723, 750, where this Court held:

> "[10] The Court of Appeals recognized, and respondent concedes here, that a well-settled line of authority from this Court establishes that a consent decree is not enforceable

directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it. United States v. Armour & Co., 402 US 673, 29 L Ed 2d 256, 91 S Ct 1752 (1961); Buckeye Co. v Hocking Valley Co., 269 US 52, 70 L Ed 155, 46 S Ct 61 (1925)."

In United States v. International Bldg. Co. (1953) 345 U.S. 502, 506, the United States Supreme Court held as follows:

"A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater

dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties."

Since plaintiff Terry had no adequate representation in the Delaware class actions, and since a class action judgment is not enforceable where there is no adequate representation, and since Terry never joined the class actions in Delaware, there can be no res judicata or collateral estoppel with respect to plaintiff Terry's present California action from the Delaware consent judgment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District.

Respectfully submitted,

JOHN JOSEPH HALL
Attorney for Petitioner
January, 1986

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

2D CIV. NO. B008588 &
B002941
(Super.Ct.No.
WEC78784)

CHARLES TERRY,

Plaintiff and Appellant,

v.

MARTIN STONE, HARVEY L. KARP,
GEORGE H. LEVINE, and MONOGRAM
INDUSTRIES, INC., a corporation,

COURT OF APPEAL-SECOND DIST.

FILED

JUL 3 - 1985

CLAY ROBBINS, JR. Clerk

Deputy Clerk

APPENDIX A

In February of 1983 appellant Charles Terry filed his complaint for breach of fiduciary duty and damages wherein he alleged that respondents Martin Stone, Harvey L. Karp and George H. Levine, as officers, directors and controlling shareholders of respondent Monogram Industries, Inc. had unlawfully entered into an agreement for the purchase of their stock by Nortek, Inc., a Rhode Island Corporation, at a price of some $75 per share when such stock was trading on the New York Stock Exchange for about $50 per share, thereby depriving appellant of the pro rata portion of the inflated value with respect to Monogram stock owned by appellant.[1/]

1/ More particularly, appellant alleged in part that:

"1. Plaintiff is * * * the holder of eight thousand shares of stock in defendant Monogram Industries, Inc.

"2. Defendant Monogram Industries, Inc. (Monogram) is * * * a corporation organized and existing under the laws of the State of Delaware * * *.

"3. Defendant Martin Stone (Stone) is, and at all times herein mentioned, was, Chairman of the Board of Directors, and Chief Executive Officer of defendant Monogram, and was the owner of approximately 11.7% (208,099 shares) of the outstanding shares of common stock of defendant Monogram.

"4. Defendant Harvey L. Karp (Karp) is, and at all times herein mentioned, was, Vice-Chairman of the Board of Directors, President, and Chief Operating Officer of defendant Monogram and the owner of 10.7% (192,749 shares) of the outstanding shares of common stock of defendant Monogram.

"5. Defendant George H. Levine (Levine) is, and at all times herein mentioned, was, Vice-President and Director of defendant Monogram, and the owner of 5.7% (99,500 shares) of the outstanding shares of common stock of defendant Monogram.

* * * * *

"7. Defendants Stone, Karp, and Levine, dominate the management of defendant Monogram and together have a controlling interest of the outstanding common stock of defendant Monogram, and, as directors of defendant Monogram, have been, and still are, fiduciaries with respect to plaintiff.

At the time appellant's action was filed there were pending in the Court of Chancery of the State of Delaware

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"8. At a time not presently known to plaintiff but known to said defendants, defendants Stone, Karp, and Levine entered into an agreement to sell all of their shares of stock to Nortek, Inc., a Rhode Island corporation, for * * * a total of $40,000,000.00 cash. * * *

* * * * *

"11. Due to the actions of defendants Stone, Karp, Levine, and Monogram, and each of them, plaintiff has been damaged in not being allowed to participate in the sale (pro rata) of stock to Nortek, Inc. in the amount of at least $24.00 per share, a total of approximately $192,000.00, * * *.

* * * * *

"13. The acts and conduct described herein of defendants and each of them were done with a conscious disregard for plaintiff's rights and with the intent to vex, injure, or annoy plaintiff, such as to constitute oppression, fraud and malice under Civil Code §3294, entitling plaintiff to punitive damages * * *."

two suits involving the same transaction, in the contexts of derivative and class actions. Based on these previously filed and pending suits, respondents successfully moved to stay appellant's action on the ground of inconvenient forum, the trial court on May 16, 1983, ruling that:

> "On the grounds of forum non conveniens motion is granted for stay without prejudice to motion to vacate the stay upon sufficient showing of change in circumstances."2/

Appellant appealed from this order on July 15, 1983.

2/ Though not important to our determination, the court additionally found that personal jurisdiction in the cause was lacking as to respondent George H. Levine.

Following notice and hearing thereon, the Delaware actions were settled with court approval, as reflected in the Delaware court's final order and judgment entered on August 25, 1983. 3/ As a result of this disposition, respondents successfully demurred to appellant's complaint and the matter was dismissed on July 2, 1984, on the ground appellant's causes of action were barred by the doctrine of res judicata.

3/ The settlement and judgment provided inter alia for sale of stock by members of the class, i.e., the shareholders, to Nortek, Inc. at a price reflecting the above-market value placed by Nortek on Monogram shares, conditioned on dismissal of the Delaware actions with prejudice.

Appellant thereafter also appealed from this order. We consolidated his two appeals by our order of August 7, 1984. We now affirm the order of dismissal and dismiss as moot the appeal taken from the stay order, upon the following rationale.

Stated briefly, what is contended by appellant is (1) that his appeal from the stay order of May 16, 1983, deprived the trial court of jurisdiction to pass upon respondents' demurrer or to order dismissal of the action, owing to the provisions of Code of Civil Procedure section 916 (a),4/ and (2) that the Delaware

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4/ "* * * the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment
(continued on next page)

judgment in certain particulars did not fully encompass the claims set out in his complaint, so as to be inadequate to prevent his further prosecution of those claims, or was invalid as to him as a purported member of the class to which it related.

It is clear to us, however, that, concerning the first of these points, appellant, in essence, could not have obtained more from the most advantageous disposition of his initial appeal than what transpired when respondents pursued the matter through their demurrer, thereby to all

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4/ (continued)

or order but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

intents and purposes abandoning what had been granted them by the stay order, and that accordingly that appeal was not only rendered moot (see Consolidated Vultee Aircraft Corp. v. Local 904, UAW (1946) 27 Cal. 2d 859, 863) but was one arising from circumstances wherein no prejudice or injustice was suffered by appellant from the trial court's actions. (See Cal. Const., Art. 6, sec. 13; Code, Civ. Proc., § 475.)

In like fashion it is clear to us appellant's second point is not well taken, since the record discloses not only that the Delaware judgment dealt precisely with the issues raised in appellant's complaint, 5/ but that

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5/ Appellant's insistence he should be able to continue to seek punitive damages because such were not

(continued on next page)

appellant accepted the terms of the settlement by tendering his Monogram shares in conformance therewith, thereby precluding any claim the judgment was not binding upon him.

The appeal from the stay order dated May 16, 1983, is dismissed as moot. The order of dismissal filed July 2, 1984, is affirmed.

Costs on each of the appeals to be

5/ (continued)

part of the settlement is, of course, at odds with fundamental principles associated with the doctrine of res judicata. (See Olwell v. Hopkins (1946) 28 Cal.2d 147, 152. See also Ford Motor Co. v. Superior Court (1973) 35 Cal.App.3d 676, 680.)

borne by the respective parties thereto.

NOT FOR PUBLICATION.

Roth, P. J.
ROTH

We concur:

Beach, J.
BEACH

Gates, J.
GATES

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 16 1985

I have this day filed Order REVIEW DENIED

REVIEW DENIED
BIRD, C.J. + MOSK, J. ARE OF THE OPINION THAT THE PETITION SHOULD BE GRANTED.

In re: B002941 *No.* B008588

Terry

vs.

Stone et al.

Respectfully,

Clerk

APPENDIX B

APPENDIX C

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION 2

John Joseph Hall
1631 Beverly Blvd.
Los Angeles, CA 90026

RE: Terry,Charles,
vs.
Stone, Martin, Et al.
2 Civil B002941
Los Angeles Co. No. WEC78784

REMITTITUR NOTICE

Notice is hereby given that the Remittitur has been issued this date and that the opinion or decision entered in the above entitled cause on 07/09/85 is now final.

** Affirmed in Full. **

___Appellant ___Respondent to recover costs
_✓_Each party to bear own costs
___Costs are not awarded in this proceeding

OCT 21 1985

Clay Robbins, Jr., Clerk

By:

Deputy Clerk

APPENDIX C

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, January 14, 1986, I served the within PETITION FOR A WRIT OF CERTIORARI in re: "Charles Terry vs. Martin Stone, Harvey L. Karp, George H. Levine, and Monogram Industries, Inc." in the United States Supreme Court, Oct. Term, 1985, No.....

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

LEFF & MASON
7th Floor
9665 Wilshire Blvd.
Beverly Hills, CA 90212

HILL WYNNE TROOP & MEISINGER
9th Floor
10920 Wilshire Blvd.
Los Angeles, CA 90024

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on January 14, 1986
at Los Angeles, California.

Kathleen Kaltenbach